



# Education and Local Government Interim Committee

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## 58th Montana Legislature

### SENATE MEMBERS

DON RYAN--Vice Chair  
GREGORY BARKUS  
WILLIAM GLASER  
RICK LAIBLE  
JEFF MANGAN  
DEBBIE SHEA

### HOUSE MEMBERS

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NORMAN BALLANTYNE  
SUE DICKENSON  
TOM FACEY  
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LARRY LEHMAN

### COMMITTEE STAFF

CONNIE ERICKSON, Research Analyst  
EDDY MCCLURE, Staff Attorney  
SANDRA SHEPHERD, Secretary  
PAMELA JOEHLER, Fiscal Analyst

## LOCAL GOVERNMENT SUBCOMMITTEE MINUTES

June 8, 2004

Capitol Building, Rm. 137

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

**Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

### COMMITTEE MEMBERS PRESENT

SEN. JEFF MANGAN, Chair

SEN. WILLIAM GLASER  
SEN. RICK LAIBLE  
REP. JOAN ANDERSEN

### STAFF PRESENT

LEANNE KURTZ, Research Analyst  
EDDY MCCLURE, Staff Attorney  
KIP DAVIS, Secretary

### Visitors & Agenda

Agenda, Attachment #1  
Visitors' list, Attachment #2.

### CALL TO ORDER AND ROLL CALL

CHAIRMAN MANGAN called the Subcommittee to order at 1:00 p.m. and the secretary noted the roll (see ATTACHMENT #3). REP. ANDERSEN moved that the minutes from the last meeting be adopted. SEN LAIBLE seconded the motion and noted a typographical correction on page 9 of the minutes. The minutes, with typographical corrections, were adopted unanimously.

## **I. HJR 37 Working Group Update and Review of Draft Bill**

LEANNE KURTZ offered the Subcommittee an update on the activities of the HJR 37 Working Group and reviewed the proposed draft bill (see *EXHIBIT #1*), which amends the Subdivision and Platting Act (Title 76, chapter 3), explaining the changes to existing law.

MS. KURTZ told the Subcommittee that this proposed bill draft incorporates the consensus of the Working Group and while consensus was achieved on all major issues, with one exception which will be addressed by **Michael Kakuk**, this proposed bill draft will not resolve all subdivision and platting problems. However, the Working Group believes that it will offer a greater level of predictability and accountability for city and county planners, developers, and builders, and puts into statute what city and county planning offices have been doing as policy.

- Section 1 adds the definitions for minor subdivision and public utility.
- Section 2 removes a paragraph which properly belongs elsewhere.
- Section 3 amends the list of things that local subdivision regulations have to address, including listing things that must be included in the subdivision application for it to be determined to contain the required elements for review, procedures to deal with the requirements of Section 9, evasion criteria, the preapplication process and meeting, and application deadlines.
- Section 4 clarifies that the subdivision application must be submitted along with the preliminary plat for review by the governing body.
- Sections 5 and 6 contain small changes in language.
- Section 7 provides for a 2-stage completeness review of the subdivision application, with specific time limits for notification of adequacy to the applicant.
- Section 8 allows for more than one public hearing.
- Section 9 provides for additional public hearings if new information is presented to the governing body at the first public hearing. EDDYE MCCLURE explained the legal background of the inclusion of Section 9, offering details and consequences of Brandborg v. The Bd. of County Commissioners of Ravalli Co. and HB 94 (2003), and told the Subcommittee that Section 9 balances the public's right to know with moving the process along.
- Section 10 changes internal references and makes the code sections fit with one another better.
- Section 11 consolidates the provisions for review of minor subdivisions into one section, and provides local governments with the authority to handle small family subdivisions as dictated by the specifics of their area. MS. KURTZ explained that the language in boldface, which provides review requirements for first minors and subsequent minors from a tract of record, hasn't been completely resolved yet.
- Section 12 lists the things the governing body has to address in the written statement that is provided to the applicant, including information on appeals, relevant statutes and regulations, and facts and conclusions.
- Section 13 is a repealer for a code section containing minor subdivision regulations, the provisions of which are now included in Section 11.
- **Working Group Participant Comment**

CHAIRMAN MANGAN noted that whatever work gets done today will be presented to the full Committee tomorrow for their approval, and that the Subcommittee would work until the issues

are resolved, and then opened the floor to comments, asking that any comments on revisions be specific.

**Myra Shults, Attorney, Joint Powers Insurance Authority (Montana Association of Counties-affiliated)**, offered several suggestions to the Subcommittee, including that the definition of "public utilities" should include the local water and sewer districts within a county; and on page 20 the word "impact" should be substituted for the word "effect" to paragraph (3)(a), to assist local governments who do not fully understand what "weigh the criteria" means. **Ms. Shults** added that her organization still has a problem with Section 11, because the problem with coming in with first minors is that they can be expedited and, at some point, this becomes a violation of the whole intent of the Subdivision and Platting Act, which requires proceeding according to a plan and for the local governing bodies to have some control over what is being done. The amendments contained in Section 12(4) are, in the opinion of MACo, unnecessary.

**Peggy Trenk, Montana Association of Realtors**, noted her organization's approval of the way the proposed bill clarifies roles and requirements for a local governing body's denial of an application. MAR also approves of the way local government accountability and predictability and the efficiency of the local subdivision process has been improved. With the exception of a policy issue involving exemptions and first minors, MAR is comfortable with what this proposed bill accomplishes.

**Michael Kakuk, Attorney, Montana Association of Realtors**, distributed a flow chart demonstrating how the review process will proceed (see *EXHIBIT #2*) and told the Subcommittee that the one policy issue still in dispute involves exemptions and first minors, which is why that language in Section 11 is in boldface. The Working Group decided to let the Subcommittee decide the proper policy. Section 76-3-201 says that divisions of land under 76-3-201 are exempt from the usual subdivision review and 76-3-207 says that divisions under 76-3-207 are not subdivisions, so, in essence, the bold language in Section 11 is saying that a division that is not, under law, a subdivision is the first minor subdivision. MAR would like the Subcommittee to change that by removing the language in (1) regarding exemptions.

**Tim Davis, Montana Smart Growth Coalition**, commented that the proposed bill does make the process more predictable and provides more guidance and flexibility for local governing bodies when making a decision whether or not to approve a subdivision. **Mr. Davis** offered an argument for making an exempted subdivision the first minor subdivision, saying that there are counties within the state in which over 50% of the subdivisions are exempted divisions and most of these will, in all likelihood, be sold within 5 years, thereby providing the same effect on water quality, local services, and other areas of impact as a subdivision that had undergone the full review process.

**Jeff Bollman, President, Montana Association of Planners**, questioned whether, on the third line of page 25, the reference to "76-3-608(3)" should be "76-3-608(3)(a)", and added MAP considers exemptions to be an issue because of the cumulative impact these divisions have. From the perspective of MAP, giving control to the local governing bodies was very important because the needs of communities in western Montana are very different from the needs of communities in eastern Montana. **Mr. Bollman** also said that, in the opinion of MAP, the amendments contained in Section 12(4) are unnecessary.

**Harold Blattie, Assistant Director, Montana Association of Counties**, emphasized the importance of including the county water and sewer districts in the definition of public utilities

and noted, on page 13 at the end of (b), that the requirement that the local governing body give a copy of the application and preliminary plat to school district trustees and is probably unnecessary. He said an informational synopsis would suffice. **Mr. Blattie** expressed his concern with the requirement contained in paragraph (iii), at the top of page 25, which refers to zoning regulations that address the criteria in 76-3-608(3), stating his belief that, because every subdivision is a site-specific situation, zoning ordinances cannot be written to address all of the impacts contained in 76-3-608(3).

- **Public Comment on Draft Bill** -- None
- **Subcommittee Questions and Comments**

MS. KURTZ noted that many of the suggestions are technical changes, such as the definition of public utilities, which she would incorporate into the proposed bill draft and directed the Subcommittee's attention to the policy decision required for boldface language in Section 11 (76-3-609) and the question of whether or not the amendments contained in Section 12 (76-3-620) are necessary.

CHAIRMAN MANGAN stated that the Subcommittee need not spend time on the issues under agreement or on reasonable technical changes, such as the definition of public utilities and an informational summary to school trustees, but items such as the policy decision involved in 76-3-609 do need the attention of the Subcommittee and opened the floor to Subcommittee discussion and questions to the Working Group.

SEN. LAIBLE asked how many exemptions actually take place during a calendar year. **Mr. Davis** answered that it is a threshold issue, because even 5 or 10 exemptions can have a serious impact, especially in a rural area. A study performed 3 years ago in the 16 fastest-growing counties in the state, showed that there were significant numbers of exempted subdivisions, several hundred in fact, constituting over 50% of the approved subdivisions in many areas. SEN. LAIBLE then asked if members of the Working Group would feel comfortable if limits were placed on the number of exemptions allowed on an original tract of record. **Mr. Davis** answered that limiting exemptions to 5 or fewer lots would be reasonable. **Mr. Kakuk** replied that MAR would like to see the family transfer exemption not count as the first minor subdivision, because this is already limited by statute and is already within local control by the development of zoning regulations relating to minimum lot size or the development of evasion criteria. MAR would like to leave 76-3-201 (transfers created by order of the court) as is, and change (1)(b) of 76-3-207 to say that lots created through family transfers are not first minor subdivisions. Mr. Bollman said that MAP doesn't want to limit folks wanting to transfer land to a family member, but the transfers within transfers are a concern.

CHAIRMAN MANGAN called a 10-minute break, and asked the members of the Working Group to use the time to see if some kind of consensus could be reached over this issue.

When the Subcommittee reconvened, MS. KURTZ presented the revised language for 76-3-609, as agreed upon by the Working Group, saying that within the boldface language in Section 11, in three places, would read " . . . or from which no more than five parcels have been created under 76-3-201 or 76-3-207 . . .".

CHAIRMAN MANGAN asked if there were any questions or comments regarding Section 12 (76-3-620).

MS. MCCLURE told the Subcommittee that this language was included in the Brandborg case information, and it essentially tells the county to document what an approval or denial is based on and inform the applicant where this documentation can be found. This will provide more accountability for the local governing bodies in the event of a lawsuit.

SEN. LAIBLE commented that he thinks this would help the counties resolve lawsuits and give them a better opportunity to prevail within the lawsuit.

**Mr. Kakuk** said that MAR believes this language in (4) is in the best interests of the counties.

**Mr. Bollman** offered his objections, saying that there is already a requirement to provide the reasoning for denial and this language doesn't change anything except penalizing good planners by giving them more things to do. The major objection to (4) is the question of how specific these directions must be, because planners need to make sure they understand the law. **Mr. Bollman** told the Subcommittee that this was not a deal-breaker for MAP, but he does not want the Subcommittee members to have false expectations, because the planners that are not complying now will not comply with tougher requirements.

CHAIRMAN MANGAN asked **Mr. Kakuk** if simply identifying the public record would be sufficient, and Mr. Kakuk answered that, although he is unsure of MAR's viewpoint on this, as an attorney who might file an appeal, he would prefer specifics.

CHAIRMAN MANGAN asked **Mr. Blattie** to revisit his concerns about the zoning regulations mentioned on page 25 of the bill. **Mr. Blattie** replied that he doesn't feel that a zoning ordinance can be written to address all of these issues--impacts on agriculture, agricultural water user facilities, local services, the environment, wildlife and wildlife habitat, and public health and safety--on a site-specific basis. CHAIRMAN MANGAN asked what specifically could be done to the language in the proposed bill draft to address those concerns and **Mr. Blattie** answered that he would suggest deleting the language "if the minor subdivision is proposed within a jurisdictional area that has adopted zoning regulations that address the criteria in 76-3-608(3)" or removing (iii) altogether. **Mr. Davis** responded, saying that the language was taken from an existing statute and urges the Subcommittee to leave the language in, because it will create a predictable process and, if good detailed zoning is done, the local governing body will not have to address those issues in subdivision applications.

CHAIRMAN MANGAN asked SEN. LAIBLE to make a motion to direct staff to complete the proposed bill draft to include the revision to the definition of public utility, the revisions to 76-3-609 as presented by staff and the Working Group, and a revision to provide for school district trustees to receive summaries of subdivision applications, as well as necessary technical and grammatical changes, with the corrected bill draft to be presented to the full Committee with the recommendation of the Subcommittee.

SEN. LAIBLE moved that the Subcommittee adopt the proposed bill draft, with staff incorporating the following changes: the revision to the definition of public utility, the revisions to 76-3-609 as presented by staff and the Working Group, and a revision to provide for school district trustees to receive summaries of subdivision applications, as well as necessary technical and grammatical changes. REP. ANDERSEN seconded the motion. The motion passed unanimously.

## **II. Review of Sanitation-related Items and 2001 Attorney General Opinion Regarding Sanitation Information at Preliminary Plat Hearing and Review Working Group Discussions**

MS. KURTZ told the Subcommittee that the Working Group had discussed the three major components of the sanitation issue and no agreement or consensus was reached on acreage in the definition of "subdivision" in chapter 4. Another area that received attention was the possibility of the DEQ conducting some type of completeness review of applications, similar to the completeness review in the proposed bill draft. DEQ staff who attended the last Working Group meeting said that they believe it would cause more problems than it would solve because the agency has an adequacy of information and completeness checklist that staff use as they are reviewing sanitation applications. The DEQ suggested instead that it could send a letter to the applicant acknowledging receipt of the application and providing a date when the review would be finished. DEQ staff said they do not believe that legislation is needed for this issue, because the necessary changes can be accomplished internally or through Administrative Rule. The final sanitation issue that was discussed was the 2001 Attorney General's Opinion (49 Op. Att'y Gen. No. 7).

MS. MCCLURE told the Subcommittee that the key points of the Attorney General's opinion are: (1) local governments must adopt sanitation standards at least as stringent as those of the DEQ, and this applies for both 20-acre parcels and parcels up to 160 acres in size, and stricter standards can only be adopted if there is a public finding that tougher standards are necessary to protect the public health; (2) counties retain the discretion to determine the best method of adopting the minimum rules; and (3) all reviews must take place at the preliminary plat stage, with the DEQ having authority for 20-acre parcels under the Sanitation Act and the county, under the Platting Act, using DEQ rules, but without DEQ authority, for parcels of 20-160 acres. The Attorney General's opinion did not address exemptions and which exemptions are applicable to parcels of 20-160 acres. Also not addressed in the opinion was whether the exemptions in Chapter 4 apply to parcels over 20 acres and, if the Platting Act should require a sanitation review for parcels over 20 acres, who should perform the review--the county or the DEQ, which would require legislation to give the agency the necessary authority.

MS. KURTZ said that there were two viewpoints in the Working Group on the Attorney General's opinion that all review must take place at the preliminary plat stage. Those in favor believe that the public should be able to comment on the sanitation information in front of the county commissioners or planning board, and that without sanitation information the local governing body doesn't have enough information to make an informed decision on conditional approval. Also, if that information and related comments are forwarded to the application reviewers at DEQ, the process will be streamlined. Those in disagreement believe that sanitation information is scientific and should not be brought into the political arena, but should stay within the realm of the DEQ where the scientists are, and the public can still provide comments to the DEQ. The four options available to the Subcommittee are: to not pursue the issue as a Subcommittee; to give the Working Group more time to reach a compromise; to develop separate legislation as a Subcommittee for recommendation to the full Committee; and to recommend to the proper authority that a new AG opinion be requested to clarify remaining questions.

CHAIRMAN MANGAN commented that, if the Subcommittee chooses option #2 or #3, the only available time for another Subcommittee meeting would be a few hours early in the day of the final full Committee meeting in September.

- **Working Group/public Comment on Options**

Members of the Working Group agreed that they would continue to work on this issue and would try to resolve the differences of opinion and reach a compromise. The DEQ pledged to continue working with the group.

- **Subcommittee Discussion/Decision on How to Proceed**

CHAIRMAN MANGAN told the Subcommittee that Education and Local Government Committee Chairman Andersen had said that the Subcommittee would be able to meet for 2 hours before the full Committee meeting in September and, if the Working Group had reached a compromise, the Working Group could present the results to the Subcommittee at that time.

REP. ANDERSEN, SEN. LAIBLE, and SEN. GLASER commented that they would like to see the Working Group continue its efforts in the hope that a consensus could be reached by September.

CHAIRMAN MANGAN asked if it was the DEQ's position that the necessary changes to its review process can be implemented by rule, without the need for legislation. **Jon Dilliard, DEQ**, answered that the agency had identified the areas where beneficial changes can be made without legislation, but the agency was not resistant to statutory changes.

MS. KURTZ commented that, if option #2 is chosen, the 2 or 3 hour Subcommittee meeting in September would be for the purpose of updating the Subcommittee on what the Working Group has been able to accomplish and would not necessarily involve a recommendation for legislation.

CHAIRMAN MANGAN told the Subcommittee that his plan was to plan for a meeting of the Subcommittee on Sept. 13, from 8-10 a.m., for the express purpose of hearing an update and full report from the Working Group on the sanitation issue.

- **Discuss June 9 Subcommittee Report to Full Committee**

CHAIRMAN MANGAN suggested that the staff present to the full Committee the issues the Subcommittee was charged with looking at and, if there was no objection, he would like SEN. LAIBLE to present the proposed bill draft to the full Committee on behalf of the Subcommittee.

SEN. LAIBLE said that he would look forward to presenting the proposed bill draft to the full Committee and noted that the staff has said that, if the Working Group can compromise and reach a consensus by August on the sanitation issue, they would have the time necessary to draft the proposal.

CHAIRMAN MANGAN adjourned the meeting at 3:35 p.m. The next meeting is scheduled for 8 a.m. Monday, September 13, 2004.

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